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ABSTRACT

In order to test the opinion held by judicial and rhetorical scholars that distinct differences exist in rhetoric between majority and nonmajority Supreme Court decisions, an examination was made of 301 of Justice William O. Douglas' Supreme Court decisions. A hybrid methodology based on genre criticism and content analysis was used to examine the rhetorical samples in terms of the jurisprudential categories of natural law, positive law, and legal realism. Results indicated that Justice Douglas did not argue from different rhetorical-jurisprudential bases in his majority and nonmajority decisions. (DF)

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"GENERIC TENDENCIES IN MAJORITY AND NON-MAJORITY SUPREME COURT OPINIONS: THE CASE OF JUSTICE DOUGLAS"

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"GENERIC TENDENCIES IN MAJORITY AND NON-MAJORITY SUPREME COURT OPINIONS: THE CASE OF JUSTICE DOUGLAS"

The casual statements of heroic figures often cut deep paths in subsequent opinion about the object of the assertion. In the early part of this century, two heroes of American jurisprudence, Charles Evans Hughes and Benjamin Cardozo, made statements regarding the nature of judicial rhetoric which may be examples of such dicta becoming more influential than the authors might have intended. Both were addressing the notion of variations between the rhetoric of majority and non-majority opinions. In 1928 Chief Justice Hughes, in a frequently quoted passage, asserted that, "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."[1] Only three years later, Justice Cardozo observed that, "comparatively speaking at least, the dissenter is irresponsible," and that therefore,

> We need not be surprised . . . to find in dissent a certain looseness of texture and depth of color rarely found in the per curiam. Sometimes, . . . there is just a suspicion of acerbity, but this after all, is rare. More truly characteristic of dissent is a dignity, an elevation of mood and thought and phrase. Deep conviction and warm feeling are saying their last say with knowledge that the cause is lost. . . . The dissenter speaks to the future, and his voice is pitched to a key that will carry through the years.[2]

Subsequent scholars, perhaps feeling the influence of Hughes' and Cardozo's pronouncements, also have seen distinct differences between majority and non-majority opinions. Percival Jackson wrote that, unlike the comparatively unconstrained dissenter, "the judge who writes for the Court must not roam the fields; on the contrary, he must weigh his words within an ambit of discretion so that he may secure agreement from his

fellows."[3] Similarly, Don R. LeDuc,[4] Chief Justice Harlan Fiske Stone,[5] Solomon Resnik,[6] and Henry Abraham,[7] to name only a few, have claimed that majority and non-majority Supreme Court opinions were different rhetorical sub-species.

In the face of such a gallery of judicial and academic heavyweights, a good bit of teremity is required to suggest that the claim of inherent differences between majority and dissenting opinions may be overstated. That, however, is what this paper will do, and the justification upon which it proceeds was provided by Cardozo himself, when he observed that the philosophical, legal, and factual bases of opinions should be the focal points for studying judicial rhetoric, for these inventional choices are,

> . . . more important than the mere felicities of turn or phrase. [They] are what we may term the architechtonics of opinions. The groupings of fact and argument and illustrations so as to produce a cumulative and mass effect; these, after all, are the things that count above all others.[8]

What I read in Cardozo's statement is the suggestion that while there may in fact be felicitious differences between majority and non-majority opinions, we must look to more substantive elements of the discourse before deciding finally that more substantive differences exist. More specifically, the phrase "grouping of fact and argument and illustration" suggests to me the possible existence of rhetorical genres in judicial opinions, and that leads me to ask: are there differences between majority and non-majority Supreme Court opinions which are explainable in terms of diverse rhetorical genres dominating each opinion type?

To answer this question, I examined three hundred and one of Justice William O. Douglas' first amendment opinions.[9] The basic method adopted was a hybrid formed from genre criticism and content analysis, and the

assumptions which underlay the research should be made explicit.

The assumption which underlies genre criticism is basically essentialistic: by focusing upon the commonalities of discourse instead of the pecularities, we move closer to grasping its essential nature. This essentialistic conception of discourse provided the assumptive base of Black's important work, Rhetorical Criticism: A Study in Method. He summarized the position by suggesting that,

> if one of the major objectives of rhetorical criticism is to enrich our understanding of the rhetorical uses of language critics can probably do their work better by seeing and disclosing the elements common to many discourses rather than the singularities of a few.[10]

Black's genre approach to rhetorical scholarship is superior to the Neo-Aristotelian perspective precisely because its epistemological aim is essentialism rather than the more narrow, existentialist aims of the latter. While the sensitive and thorough explication of a single rhetorical event, such as Nichols' well-known essay on Lincoln's first inaugural,[11] certainly claims value in and of itself (an existentialist view), it makes no claims to illuminate the nature of presidential inaugurals as a genre.[12]

The essentialistic assumptions of generic criticism received their most elegant statement to date in the recent collection of essays edited by Campbell and Jamieson entitled Form and Genre: Shaping Rhetorical Action.[13] The editors insisted initially that "the justification for a generic claim is the understanding it produces rather than the ordered universe it creates,"[14] and the first criterion they set for generic criticism was that "classification is justified only by the critical illumination it produces not by the neatness of a classificatory schema."[15] Northrop Frye's

insistence that "the purpose of criticism by genres is not so much to classify as to clarify"[16] is clearly hospitable to this criterion.

Campbell and Jamieson explained just what the critic seeks when pursuing clarification as a goal. The aim is to find the "internal dynamic" which binds together constellations of substantive and stylistic forms. Thus, when the critic purports to have found a rhetorical genre, the claim is being made "that a group of discourses has a synthetic core in which certain significant rhetorical elements, e.g., a system of belief, lines of argument, stylistic choices, and the perception of the situation, are fused into an indivisible whole."[17]

The underlying premise and the ultimate goal of genre criticism, then, are seen to intersect in the notion of essence--the belief that messages have essential natures, and that these may vary as a function of the constraints operating in different rhetorical situations, leads the critic to seek such essences in the form of the "internal dynamic" of a class of messages.

The message-centered approach of content analysis assumes that the content of messages indexes something else. Such inferences may be to sources, receivers, or other messages, but they all rest upon the same assumption. If, for example, the researcher infers from content data to the attitudes, values, beliefs, or motives of the source, the research relies upon a psycholinguistic theory known as the "representational model." The core of the theory as well as its relevance to content analysis was explained by its primary author, Charles Osgood:

> The 'representational model' in content analysis assumes (1) that in <u>semantic encoding by the source</u> the occurrence of specific lexical items in his messages is indicative of the immediate prior occurrence in his nervous system of the corresponding

> representational mediation processes; and (2) that in semantic decoding by the receiver the occurrence of specific lexical items in messages are predictive of the occurrence in his nervous system of those representational mediation processes which he has developed in association with these signs. This, of course, is merely a more formal way of saying that words 'express' the ideas of the speaker and 'signify' ideas for the hearer.[18]

Thus, when the researcher infers from message events to the source of the message, he is relying upon psycholinguistic theory which postulates a relationship between those events and certain states or events in the source. In addition to inferences about sources, the message-based researcher may also make inferences about receivers, or possibly other messages. Nevertheless, the underlying assumption remains the same: message content indexes other communication variables.

The methodological literature in content analysis stresses two additional points that Simons urged also upon genre critics. One speaks to the issue of theoretic parameters being established and the other to the need for specification of analytic procedures. He insisted that "the task of generic identification should take place within theoretical frameworks, should be guided by theoretically devised hypotheses, and should be focused upon theoretically significant similarities."[19] While he may be correct that categories drawn from aesthetics or literature might not prove helpful to the rhetorical critic, it is more difficult to accept his exclusion of philosophy as a source of hypotheses for generic criticism.[20] The historic proximity of rhetoric, law, and philosophy led this researcher to the position that a theoretic framework drawn from jurisprudence for the purpose of attempting to discover rhetorical genres in judicial opinions is admissible,

appropriate, and valuable. The well-established theoretic framework of jurisprudence makes it admissible; the inherent intersection of rhetoric, law, and philosophy makes it appropirate; and because such a study promises theoretic contributions to both rhetorical scholarship and jurisprudential scholarship, its value is evident.

The hybridization of genre criticism and content analysis referred to earlier took shape in this study as three operational definitions of rhetorical genres each drawing its warrant from a unique school of legal philosophy and feeling its constraints in the institutional requirements and traditions of the American Supreme Court and the Anglo-American system of common law. Space precludes an adequate explication presently of the justification for these hypotheses. The logic upon which that justification was based, however, was rather straight forward: three broad orientations to the nature of law exhaust one's philosophical options in jurisprudence--natural law, legal positivism, and legal realism; these categories imply differences substantial enough to sustain a claim of mutual exclusivity; and finally, philosophy is argument.

The first hypothetical rhetorical genre was operationalized as "Argument from Ideal: The Natural Law Warrant," and was defined as follows: Arguments drawing warrants from natural law philosophy rely predominantly or exclusively upon such self-evident moral-deontic principles as justice, unalienable rights, fairness, and the dictates of reason. Such arguments do not rely ultimately upon statute, precedent, or extra-judicial evidentiary materials.

The second hypothetical rhetorical genre flowing from jurisprudence was operationalized as "Argument from Rule: The Positive Law Warrant," and was defined as follows: Arguments drawing warrants from legal positivism rely predominantly or exclusively upon statutory or case-law rules. Such arguments tend to be deductive and/or analogical--the legal rule providing either the major premise for a deduction or the model for an analogy, the facts of the instant case the minor premise or analog, and the decision the necessary conclusion.

The third hypothetical rhetorical genre finding warrants in jurisprudence was operationalized in this study as "The Argument from Context: The Legal Realist Warrant." It was defined as: Agruments drawing warrants from legal realism, while possibly referring to statutory or case-law rules, in fact rely upon reference to social goals for support and typically stress the exigencies of the instant case or extra-judicial evidentiary materials.

Once categories have been defined, criteria must be established according to which coding units will be assigned to them. This, of course, hinges upon the designation of the coding unit itself. The nature of the questions posed in this study required that the entire opinion be adopted as the coding unit. Choice of the complete opinion as the unit of analysis was endorsed by Holsti, who advised that the individual document of interest may be assigned a "single score which most closely characterizes its major theme. In this case we make a single qualitative judgment about the entire document without tabulating the frequency with which any content attribute appears [within it]."[21] Having thus designated what the coding unit shall be, the content analyst must proceed next to elucidating the content attribute

which must be present in (or absent from) the content unit in order to justify assigning it to one category instead of another. Typically this takes the form of instructions to coders who will perform the task of reading the material and making a coding decision. Frequently, the primary researcher performs considerable preliminary analysis, leaving the coders with little more than clerical duty. Their decisions are then statistically compared and the researcher points with some pride to high reliability coefficients. However, some research problems are such that the use of multiple coders is impossible, and even if their work is genuinely judgmental rather than clerical, statistical reliability tests are ruled out. The present study is such a case.

Osgood, Saporta, and Nunnally suggested that in some cases (although usually multiple coders are preferable) the primary researcher is justified in doing all coding individually.[22] Two aspects of the present study were felt to be sufficient to preclude the use of multiple coders. First, the sophistication in jurisprudential literacy was felt to be such that it could not be meaningfully reduced to coding instructions. Second, the actual coding of the three hundred and one opinions into Not Relevant, Argument from Ideal, Argument from Rule, and Argument from Context required vast amounts of time. The liklihood of obtaining even remotely reliable data from hired coders for such a long-term task eliminated their use as a consideration.

That, however, does not relieve the researcher from attempting to insure the reliability of his own coding decisions. The present study attempted to achieve such reliability by dividing coding decisions into two stages. In the first stage, relevant decisions were read and tagged

according to rhetorical/jurisprudential category on the basis of the operational definitions specified above. This resulted in an initial grouping of the two hundred and seven relevant opinions into three lists according to the researcher's first impression of the orientation of their warrant. In the second stage, each opinion in each group was re-read in an attempt to ascertain a recurrent pattern of rhetorical practice evident in the category. Once again, the hypothetical definition of the three rhetorical genres was the researcher's guide in this analysis. Notes were taken on a standard form recording both the rhetorical/jurisprudential bases of the opinion and the type of majority or non-majority opinion it represented. The sources which appeared to predominately provide the basis of the opinion (ideals, rules, or contextual factors) made up the content attribute of the document which dictated the coding decision.

Within the methodological framework employed in this study, the answer to the question of whether William O. Douglas argued from different rhetorical-jurisprudential bases in majority opinions than in non-majority opinions is an emphatic no. The obvious disclaimer in order is that just as there are "as many ways of finding the ratio of a case as there are ways of finding a lost cat,"[23] there are as many ways of slicing a rhetorical cheese as there are critical mice to nibble at it. Replicability is not a prime objective of the critical method. But genre criticism, properly conceived and clearly operationalized, may hold more promise of getting critical responses to rhetorical artifacts somewhat more consistent with one another and thereby move us closer to the goal of theory building in rhetorical criticism. Another critic examining Douglas' first amendment opinions from a non-generic perspective might find

differences between the rhetoric of majority and non-majority opinions, especially if that is what he was looking for. But by combining the genre approach derived from legal philosophy and rhetorical theory with the systematic and quantitative approach of content analysis, no such differences were found, despite the substantial and persuasive body of scholarship claiming that they should be there. The logic of this agrument perhaps should be made explicit. If the category system adopted herein is valid (i.e., exhaustive of rhetorical options as manifested in jurisprudential orientation), and if it were followed uniformly in assigning coding units to categories, and if the statistical analysis of differences between categories were properly performed, then based on the present analysis of Douglas' first amendment opinions, the received wisdom that the rhetoric of majority and non-majority opinions is vastly different is due for closer scrutiny. Such procedures might even prove to be replicable.

Tables 1 and 2, display the frequencies and percentages of majority and non-majority opinions respectively by genre. The chi square test[24] indicated that these frequencies represent differences significant at the $p < 0.001$ level, meaning that regardless of whether he was in the majority or dissent, Douglas displayed a dominant preference for rule-based arguments. Table 3 however, displays what may be the most important finding of the present study. When the frequencies of majority opinions occurring in each genre are compared with the non-majority frequencies for each genre, differences in statistical significance at the $p < 0.05$ level were not found, meaning that whether he argued from Ideal, Rule, or Context, the opinion type was not a factor sufficiently strong to predict Douglas' generic tendencies.

When his opinions were broken down into the four subtypes, as seen in Table 4, both of these findings held true, there was no significant difference between majority and non-majority rhetorical options--a uniform preference for the Argument from Rule across opinion types recurred. This genre accounted for no less than 50.5% of any opinion sub-type and reached a high of 73.3% in the case of procedural dissents. And finally, as Tables 5 and 6 illustrate, when the majority and non-majority groups were independently analyzed, the same result recurred, no statistically significant differences between the sub-types of either group were found.

These data thus raise serious questions about the often asserted differences between the rhetoric of majority and non-majority opinions. If replicability is not a goal of rhetorical criticism, accuracy certainly is and perhaps only through analyzing large number of objectively selected opinions--majority and dissent--can we get an accurate picture of their nature. The critic armed with a more narrow perspective may very well be unduly influenced by the grand language of a Cardozo or a Hughes and thus go out and "find" that dissents which "appeal to the brooding spirit of the law," are vastly different from majority opinions. But such research would tell us nothing of what was <u>not</u> found by <u>not</u> looking at large numbers of both majority and non-majority opinions. The genre approach, coupled with content analytic techniques forces the critic to look at the dull as well as the stirring opinions and a more accurate critical appraisal emerges as a result.

Table 1

Frequency of Majority Opinions by Genre

(N = 87)

Genre	Frequency*
Argument from Ideal: The Natural Law Warrant	6 (7.0%)
Argument from Rule: The Positive Law Warrant	53 (61.0%)
Argument from Context: The Legal Realist Warrant	28 (32.0%)

*(These frequencies represent differences between genres significant at the $p < 0.001$ level.)

Table 2

Frequency of Non-Majority Opinions by Genre

(N = 120)

Genre	Frequency*
Argument from Ideal: The Natural Law Warrant	12 (10.0%)
Argument from Rule: The Positive Law Warrant	64 (53.3%)
Argument from Context: The Legal Realist Warrant	44 (36.7%)

*(These frequencies represent differences between genres significant at the $p < 0.001$ level.)

Table 3

Distribution of Genres by Opinion Type

Genre	Majority	Non-Majority
Argument from Ideal: The Natural Law Warrant	6 (7.0%)	12 (10.0%)
Argument from Rule: The Positive Law Warrant	53 (61.0%)	64 (53.3%)
Argument from Context: The Legal Realist Warrant	28 (32.0%)	44 (36.7%)
Total in Opinion Type	87 (100%)	120 (100%)

These frequencies represent differences between opinion types that are not significant at the $p < 0.05$ level.

Table 4

Distribution of Genres by Opinion Sub-Type

Genre	WOD for the Majority	WOD Concurring with Majority	WOD Dissenting From Majority	WOD Dissenting From Denial of Cert., etc.
Argument from Ideal: The Natural Law Warrant	2(7.7%)	4(6.6%)	11(10.5%)	1(6.7%)
Argument from Rule: The Positive Law Warrant	17(65.4%)	36(59.0%)	53(50.5%)	11(73.3%)
Argument from Context: The Legal Realist Warrant	7(26.9%)	21(34.4%)	41(39.0%)	3(20.0%)
Total in Opinion Type	26(12.6%	61(29.5%	105(50.7%)	15(7.2%)

These frequencies represent differences between opinion types that are not significant at the $p < 0.05$ level.

Table 5

Distribution of Majority Opinion Sub-Type by Genre

Genre	WOD for the Majority	WOD Concurring With Majority
Argument from Ideal: The Natural Law Warrant	2 (7.7%)	4 (6.6%)
Argument from Rule: The Positive Law Warrant	17 (65.4%)	36 (59.0%)
Argument from Context: The Legal Realist Warrant	7 (26.9%)	21 (34.4%)

These frequencies represent differences between sub-types of majority opinions that are not significant at the $p < 0.05$ level.

Table 6

Distribution of Non-Majority Opinion Sub-Type by Genre

Genre	WOD Dissenting From Majority	WOD Dissenting from Denial of Cert., etc.
Argument from Ideal: The Natural Law Warrant	11 (10.5%)	1 (6.7%)
Argument from Rule: The Positive Law Warrant	53 (50.5%)	11 (73.3%)
Argument from Context: The Legal Realist Warrant	41 (39.0%)	3 (20.0%)

These frequencies represent differences between subtypes of non-majority opinions that are not significant at the $p < 0.05$ level.

FOOTNOTES

[1]Charles Evans Hughes, The Supreme Court of the United States (Garden City, NY: Garden City Publishing Co., Inc., 1928), p. 68.

[2]Benjamin N. Cardozo, "Law and Literature," in Law and Literature and other Essays and Addresses (NY: Harcourt, Brace and Company, 1931), p. 7.

[3]Percival Jackson, Dissent in the Supreme Court: A Chronology (Norman: University of Oklahoma Press, 1969), p. 15.

[4]"'Free Speech' Decisions and the Legal Process: The Judicial Opinion in Context," Quarterly Journal of Speech 62 (October 1976).

[5]Quoted in Alpheus T. Mason, Harlan Fiske Stone (New York: The Viking Press, 1956), p. 591.

[6]"Black and Douglas: Variations in Dissent," Ph.D. dissertation, New School for Social Research, 1970.

[7]The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France, 3rd ed. (New York: Oxford University Press, 1975), p. 205.

[8]Cardozo, "Law and Literature," pp. 32-33.

[9]Raymond S. Rodgers, "Justice Douglas on the First Amendment: Rhetorical Genres in Judicial Opinions," Ph.D. dissertation, University of Oklahoma, 1979, directed by Dr. Paul A. Barefield. These opinions were selected on the basis of a broadly phrased query to the LEXIS legal data retrieval system. A discussion of the system may be found in Raymond S. Rodgers, "'Congress Shall Make No Law. . . ': A Computer-Assisted Content Analysis of the Decisions of Justice William O. Douglas on the Issues of Obscenity and Pornography," Free Speech Yearbook (1977), pp. 91-101.

[10]Edwin Black, Rhetorical Criticism: A Study in Method (NY: The McMillan Company, 1965), pp. 176-177.

[11]Maire Hochmuth Nichols, "Lincoln's First Inaugural," in Robert L. Scott and Bernard L. Brock, eds., Methods of Rhetorical Criticism, A Twentieth Century Perspective, (New York: Harper and Row, Publishers, 1972), pp. 66-100.

[12]For contrast, see Donals Wolfarth, "John F. Kennedy in the Tradition of Inaugural Speeches," Quarterly Journal of Speech 47 (April 1961), pp. 124-143.

[13]Karlyn Kohrs Campbell and Kathleen Hall Jamieson, Form and Genre: Shaping Rhetorical Action (Falls Church, Va.: The Speech Communication Association, 1978).

[14]Campbell and Jamieson, "Form and Genre in Rhetorical Criticism: An Introduction," in Campbell and Jamieson, p. 18.

[15]Ibid.

[16]Northrop Frye, The Anatomy of Criticism: Four Essays (Princeton, NJ: Princeton University Press, 1957), pp. 247-248.

[17]Campbell and Jamieson, p. 21.

[18]Charles Osgood, "The Representational Model and Relevant Research Methods," in Ithiel de Sola Pool, ed., Trends in Content Analysis (Urbana: University of Illinois, 1959), p. 39.

[19]Simons, p. 41.

[20]Cf., Recommendation #31 of the New Orleans Conference on Research and Development in Speech Communication, which stated in part: "Opportunities exist to advance speech communication theory and research through amplification and refinement of formulations originating in other branches of the behavioral sciences and humanities." (Robert J. Kibler and Larry L. Barker, eds., Conceptual Frontiers in Speech Communication (New York: Speech Association of America, 1969), p. 36.

[21]Ole R. Holsti, Content Analysis for the Social Sciences and Humanities (Reading; Mass.: Addison-Wesley Publishing Company, 1969), p. 99.

[22]Charles Osgood, Sol Saporta, Jum C. Nunnaly, "Evaluative Assertion Analysis," Litera III (1956), pp. 47-102.

[23]A. W. B. Simpson, "The Ratio Decidendi of a Case and the Doctrine of Binding Precedent," in G. G. Guest, ed., Oxford Essays in Jurisprudence (London: Oxford University Press, 1961), p. 159.

[24]The chi square formula adopted in this study was taken from Frederick Williams, Reasoning with Statistics, 2nd ed., (New York: Holt, Rinehart, & Winston, 1979) pp. 106-110.